

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

JUN 14 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GREGORY DEAN ARTZ,

Appellant.

2 CA-CR 2006-0120

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051640

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Diane Leigh Hunt

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
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PELANDER, Chief Judge.

¶1 After a jury trial, appellant Gregory Artz was convicted of manslaughter, criminal damage, misdemeanor driving while under the influence of an intoxicant (DUI), and

extreme misdemeanor DUI. The trial court sentenced Artz to concurrent, partially aggravated prison terms, the longest of which was fifteen years. On appeal, Artz contends the trial court erred in precluding certain testimony by his expert and in imposing aggravated prison terms. Finding no error, we affirm.

## **BACKGROUND**

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In April 2005, Artz turned his vehicle directly in front of an oncoming motorcycle, causing a collision in which the motorcyclist was killed. At the scene, Artz smelled of alcohol, his speech was slurred, and he staggered when he walked. A police officer attempted to administer field sobriety tests, but Artz was unable to complete the first and refused any others. The officer arrested Artz, and retrograde analysis performed by a state criminalist showed his blood alcohol concentration (BAC) had been between .326 and .398 at the time of the collision.

## **DISCUSSION**

### **I. Expert testimony**

¶3 Artz first argues the trial court “violated [his] state and federal due process rights when it sustained the state’s objection to a defense expert’s opinion regarding [his]

ability to see the motorcycle.”<sup>1</sup> On the fourth day of trial, Artz called Paul Gruen, an accident reconstructionist, to testify about the accident. Without first laying any foundation, defense counsel asked Gruen if he had “come to any . . . conclusion about whether or not the truck driver [Artz] was able to perceive the motorcycle.” Before Gruen could answer, the prosecutor objected, and a bench conference followed.

¶4 The prosecutor argued Artz had not disclosed that Gruen would testify on whether Artz could have seen the motorcycle, noting Gruen had stated in a pretrial interview that “he would not be offering any evidence about whether visibility [had] influenced the collision” and that “he would not be offering opinions about how [various] factors [including any visual obstructions, had] influence[d] th[e] collision[.]” The prosecutor also said, “there is no foundation for this expert to say what [Artz] could or could not see.”

¶5 Defense counsel said he could “lay the foundation,” acknowledged he had “asked a poor question,” and said he “w[ould] withdraw” it. Defense counsel did not challenge the prosecutor’s assertion about lack of disclosure, explaining that any such opinion “was not previously disclosed to the State because we didn’t have all the information available to us until we had [Gruen] on the stand.” Defense counsel then

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<sup>1</sup>We agree with the state that Artz waived any claims of alleged constitutional error by failing to raise them below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-22, 115 P.3d 601, 607-08 (2005) (defendant forfeits untimely claims unless he or she can prove fundamental prejudicial error); *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (“preclusion of issues [not raised below] applies to constitutional objections”).

suggested that, based on unspecified “evidence [that] was developed at trial,” Gruen had a new, previously undisclosed opinion that Artz “didn’t see the motorcycle.”

¶6 After defense counsel said he had nothing further to add, the trial court expressed “concern[] about the lack of full disclosure,” did not find the defense’s “explanation [for late disclosure] satisfactory,” and “independent[ly]” did not “find the proposed expert’s testimony as proper expert testimony.” The court further noted that “expert testimony should be limited to giving the jur[ors] information that may not be within their realm of understanding to help them decide the case but with that information they can make the ultimate conclusions about whether or not Mr. Artz saw the motorcycle.” And the court ultimately ruled it would “allow in general terms th[e] witness to talk about these various factors[, but] w[ould] not allow th[e] witness . . . to venture an ultimate opinion about whether Mr. Artz did or did not see the motorcycle.”

¶7 Gruen then testified extensively about his accident reconstruction analysis and the dynamics of the collision. When defense counsel asked him “about a concept called conspicuity,” Gruen testified that term referred to “how conspicuous an object is, how easy is it to see it.” Gruen then testified generally on “some of the factors that go into” conspicuity. And he specifically testified that, “based on [human factors] studies and [his] personal experience,” “the leading cause of car[-]motorcycle accidents . . . has been that people simply did not see the motorcycle” and that “motorcycles are hard to see.”

¶8 Artz argues that the trial court was “mistaken [in its] belief that [he] had committed a disclosure violation and that the [expert’s] testimony was improper because it amounted to an ultimate issue.” “The admission of expert testimony is within the sound discretion of the trial court, and we will not disturb that decision on appeal absent a clear abuse of discretion.” *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993); *see also State v. Mincey*, 141 Ariz. 425, 441, 687 P.2d 1180, 1196 (1984) (“The determination of whether an expert’s opinion will so help the jury is a matter within the sound discretion of the trial court.”). In addition, “we can affirm the [trial court’s] ruling on any basis supported by the record.” *State v. Moody*, 208 Ariz. 424, ¶ 81, 94 P.3d 1119, 1144 (2004).

¶9 For several reasons, we find no abuse of discretion in the trial court’s evidentiary ruling. First, although both sides acknowledge the trial court did not clearly limit Gruen’s testimony on disclosure grounds, the court expressed its concern with Artz’s “lack of full disclosure.” To the extent its ruling was influenced by that disclosure failure, we find no error. *See generally* Ariz. R. Crim. P. 15.2, 16A A.R.S.; *cf. State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975). That is particularly so when Artz failed to adequately explain how or what evidence developed during trial might have led to any new opinion and when Gruen had expressly said in his pretrial interview he would not be offering any opinions on how conspicuity or visibility factors affected the collision.

¶10 Second, Rule 103(a)(2), Ariz. R. Evid., 17A A.R.S., provides that “[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” *See also State v. Kaiser*, 109 Ariz. 244, 246, 508 P.2d 74, 76 (1973) (with certain exceptions, evidence generally “cannot be reviewed on appeal in the absence of an offer of proof showing that the excluded evidence would be admissible and relevant”). When, as here, an objection to proffered evidence is made on foundation grounds, the offer of proof must establish foundation and specify what the proffered evidence is. *See Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985); *see also State v. Fendler*, 127 Ariz. 464, 477, 622 P.2d 23, 36 (App. 1980) (appellant could not claim error on appeal relating to excluded evidence when he did not “proffer to the [trial] court what he intended to introduce by way of specific testimony or otherwise”); *State v. Taylor*, 119 Ariz. 324, 325, 580 P.2d 785, 786 (App. 1978) (offer of proof inadequate when it “failed to lay a foundation for its admissibility”).

¶11 The prosecutor’s objection and trial court’s ruling were prompted by defense counsel’s asking Gruen if he had “come to any . . . conclusion about whether or not [Artz] was able to perceive the motorcycle.” Defense counsel subsequently withdrew that question and never again posed it to Gruen through an offer of proof. Only when the trial court pressed defense counsel did he confirm that Gruen had somehow developed “an opinion Mr. Artz didn’t see the motorcycle.” That statement, however, hardly constituted “a detailed

description of what the proposed evidence” would be. *Jones*, 145 Ariz. at 129, 700 P.2d at 827, *quoting* M. Udall & J. Livermore, *Arizona Law of Evidence* § 13, at 20 (2d ed. 1982). Nor did Artz’s offer of proof show a proper foundation for the proffered testimony. In short, Artz did not make a sufficient offer of proof on precisely what Gruen would have further testified to if allowed. And, on that basis alone, reversal is not warranted. *See Jones*, 145 Ariz. at 130-31, 700 P.2d at 828-29.

¶12 Third, aside from the disclosure and procedural deficiencies, we find no abuse of discretion in the trial court’s evidentiary ruling based on the rules relating to expert testimony. The trial court essentially restricted Gruen’s testimony on the basis that “expert testimony should be limited to giving the jur[ors] information that may not be within their realm of understanding to help them decide the case” and that, therefore, “it[ was] improper expert testimony to have . . . him say [Artz] did or did not see the motorcycle.” Under Rule 702, Ariz. R. Evid., an expert may testify “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Under Rule 704, Ariz. R. Evid., “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Nonetheless, “expert testimony must ‘(1) come from a qualified expert, (2) be reliable, (3) aid the trier of fact in evaluating and understanding matters not within their common experience, and (4) have probative value that outweighs its prejudicial effect.’” *Rojas*, 177 Ariz. at 459, 868 P.2d at 1042, *quoting State v. Moran*, 151 Ariz. 378,

380-81, 728 P.2d 248, 250-51 (1986); *see also* Ariz. R. Evid. 704, cmt. (“Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.”).

¶13 Even if the trial court’s use of the phrase “the ultimate sort of conclusion [kind of] evidence” is essentially synonymous with the legal term “ultimate issue” as used in Rule 704, as Artz suggests, a finding that expert testimony would embrace an “ultimate issue” does not automatically make that testimony admissible. Rather, admissibility of expert testimony hinges on the various factors set forth above. *See Rourk v. State*, 170 Ariz. 6, 14, 821 P.2d 273, 281 (App. 1991) (“The ultimate question on the admissibility of expert testimony is whether the expert can provide appreciable help to the jury.”); *Pincock v. Dupnik*, 146 Ariz. 91, 96, 703 P.2d 1240, 1245 (App. 1985) (expert testimony inappropriate on matter “within the knowledge and experience of the jurors”).

¶14 In view of those factors, the trial court certainly could have questioned the reliability of any proposed testimony by Gruen that Artz had not seen or could not have seen the motorcycle. Eyewitness testimony at trial showed that the motorcycle was in close proximity to the truck at the time Artz “went straight into” it. According to an eyewitness, the two vehicles were so close before the collision occurred that the “motorcyclist [could not] have gotten out of the way” in time to avoid the collision. And, as the trial court noted when it ruled on the issue, “this [wa]s not [a] situation where there[ was] a physical object

or wall or something where we'll see whether the wall can be seen around.” Thus, as the state points out, “it would have been impossible on the[] facts [of this case] for anyone [other than Artz] . . . to say with any degree of certainty whether [he] saw the motorcyclist before striking him.”

¶15 Additionally, the trial court did not err in ruling that the issue of whether a motorist actually saw or could have seen a motorcycle is within “the[ jury’s] realm of understanding.” “To determine whether expert testimony is proper on a particular subject,” the court must consider “whether the subject is one of common knowledge about which the jury can form an opinion as well as can the witness.” *State v. Nordstrom*, 200 Ariz. 229, ¶ 34, 25 P.3d 717, 731 (2001); *see also State v. Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983) (“[T]he test ‘is whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness . . . .’”), *quoting State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975). Artz failed to show how Gruen was in any way “more qualified” than the jurors to determine whether Artz had seen the motorcycle before the collision. Thus, we cannot say the trial court abused its discretion in implicitly determining that he was not. *See Mincey*, 141 Ariz. at 441, 687 P.2d at 1196.

¶16 *State v. Blakley*, 204 Ariz. 429, ¶ 37, 65 P.3d 77, 86 (2003), though distinguishable, illustrates the propriety of the trial court’s ruling. In that case, our supreme court found that a trial court had not abused its discretion in “prevent[ing an expert witness]

from rendering a final opinion as to whether [Blakley's] confession was voluntary" because the court had allowed the expert to "provide[] general information about police interrogation methods." The expert had gone "step by step through Blakley's confession, pointing out what he viewed as coercive tactics," and the "ultimate conclusion" offered by the expert, therefore, was "of little or no additional value." *Id.*

¶17 The situation here is very similar. Gruen addressed in depth how the accident had occurred and testified that "the leading cause of car[-]motorcycle accidents . . . has been that people simply did not see the motorcycle." Additional testimony on the "ultimate" fact of whether Artz had seen the motorcycle would have had "little or no additional value" to the jurors. *Id.* In sum, we find no abuse of discretion in the trial court's ruling excluding any proffered testimony of Gruen on whether Artz "did or did not see the motorcycle."

## **II. Aggravated sentences**

¶18 After trial, the trial court noted that Artz was "waiving his right to a jury determination of the emotional impact to the victim's family" and that, therefore, a jury trial on aggravating sentencing factors pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), was unnecessary. Defense counsel stated he "ha[d] discussed that with [Artz,]" but "would like it on the record." The court then explained to Artz that he "would have the right to have a jury decide whether there was emotional harm caused," but that, because he wished to waive that right, the "determination [would be] made by the court

based on information presented to it and not by the jury.” Artz responded that “[wa]s okay with [him].” And, at the subsequent sentencing, defense counsel pointed out that Artz had “demonstrate[d] remorse” by

agree[ing] to stipulate to the harm to the family, knowing that that would be something the Court could use to aggravate the sentence; knowing that as it stands now, allows the Court to consider that admission by him in a sentencing decision; and knowing that there is a possibility that that admission opens the entire matter, as it were to all possible aggravating factors.

¶19 The trial court ultimately found three aggravating circumstances: (1) “emotional harm caused to the family”; (2) “commit[ting] . . . manslaughter where the BAC . . . is over .15”; and (3) Artz’s “prior record, the misdemeanor DUI’s and the felony indictment.” The court then imposed “slightly aggravated” sentences on both the manslaughter and criminal damage counts.<sup>2</sup>

¶20 Artz contends his “sentences are illegal” because, when he waived his right “to have a jury determine the emotional impact to [the victim’s] family under the reasonable doubt standard,” “[t]he trial court did not inform him that a consequence of giving up this right was to permit the judge to find other aggravating factors by a preponderance of the evidence.” *See State v. Brown*, 212 Ariz. 225, ¶ 15, 129 P.3d 947, 951 (2006) (“[A] waiver

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<sup>2</sup>Artz was sentenced to fifteen years on his manslaughter conviction. The sentencing range for that conviction was seven years (minimum) to twenty-one years (maximum), with a presumptive term of 10.5 years. *See* A.R.S. §§ 13-604(I), 13-1103(C). Artz also received a 1.75-year prison term on his criminal damage conviction. The sentencing range for that conviction was nine months (minimum) to two years (maximum). *See* A.R.S. §§ 13-702, 13-1602(B)(2).

[of *Blakely* rights] cannot be presumed when the defendant was neither informed of the right to jury trial on aggravating factors . . . nor purported to waive such rights.”); *see also Blakely*, 542 U.S. at 303-04, 124 S. Ct. at 2537 (“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.”) (citation omitted), *quoting* 1 J. Bishop, *Criminal Procedure* § 87, at 55 (2d ed. 1872).

¶21 Although Artz concedes he did not object to these alleged sentencing errors below, he maintains he “is entitled to raise th[e] claim on appeal because the error was fundamental.” “[D]efendants who fail to object to an error below forfeit the right to obtain appellate relief unless they prove that fundamental error occurred.” *State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620, n.2 (2005); *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (“Fundamental error review . . . applies when a defendant fails to object to alleged trial error.”).

¶22 Fundamental error is “‘error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.’” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant bears the burden to show that fundamental error occurred. *Id.* “In order to obtain reversal based on unobjected-to trial error, a defendant must show ‘both that fundamental error exists and that the error in [his or her] case caused . . . prejudice.’” *State*

*v. Ruggiero*, 211 Ariz. 262, ¶ 25, 120 P.3d 690, 696 (App. 2005), *quoting Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (alterations in *Ruggiero*).

¶23 As Artz points out, “[a]n illegal sentence constitutes fundamental error.” *See State v. Alvarez*, 205 Ariz. 110, ¶ 18, 67 P.3d 706, 712 (App. 2003). Artz conceded he had caused harm to the victim’s family, a statutory aggravating circumstance that would have supported an aggravated sentence. A.R.S. § 13-702(C)(9). And, as noted above, defense counsel acknowledged at sentencing that Artz was aware his concession meant he would be waiving the right to a jury finding on aggravating circumstances, subject to a reasonable doubt standard of proof, and that his concession would permit the court to consider other aggravating factors. Because the trial court itself did not directly and explicitly advise Artz of those consequences in clear terms, however, Artz contends his waiver was not “knowing and intelligent.”<sup>3</sup>

¶24 For several reasons, we are unpersuaded by Artz’s argument and do not find any fundamental sentencing error. First, as noted above, among the aggravating circumstances the trial court found was Artz’s prior misdemeanor DUI convictions. Artz does not challenge that finding on appeal. The Supreme Court has “excepted prior

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<sup>3</sup>We note that Artz does not cite *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969), or *State v. Brown*, 212 Ariz. 225, 129 P.3d 947 (2006), but instead relies on a 1966 case in which Division One of this court stated that a “person cannot later complain that he was denied counsel” when “the record affords substantial basis for the conclusion that the waiver of the right to counsel was made by one who knowingly and intelligently waived that right with an intelligent conception of the consequences of his act.” *State v. Mohon*, 3 Ariz. App. 82, 84, 412 P.2d 79, 81 (1966).

convictions from the general principle that facts that increase the penalty for a crime must be presented to a jury and proved beyond a reasonable doubt.” *State v. Aleman*, 210 Ariz. 232, ¶ 25, 109 P.3d 571, 579 (App. 2005), *citing Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). And prior misdemeanor DUI convictions qualify under that exception. *See Aleman*, 210 Ariz. 232, ¶ 26, 109 P.3d at 580. Once the trial court found as an aggravating circumstance Artz’s prior convictions, the court was free to find other aggravating circumstances by a preponderance of the evidence. *See State v. Burdick*, 211 Ariz. 583, ¶ 13, 125 P.3d 1039, 1042 (App. 2005) (“one *Blakely*-compliant or *Blakely*-exempt factor is enough to allow the trial court to consider other aggravating factors in sentencing the defendant”); *see also Ruggiero*, 211 Ariz. 262, ¶ 29, 120 P.3d at 696.

¶25 Second, the trial court also found as an aggravating circumstance the fact that Artz had committed “manslaughter where the BAC . . . is over .15.” Under A.R.S. § 13-702(C)(16), it is an aggravating circumstance for one to be convicted of manslaughter “arising from an act that was committed while driving a motor vehicle and the defendant’s alcohol concentration at the time of committing the offense was 0.15 or more.” In finding Artz guilty of “Driving With an Alcohol Concentration of 0.15 or More,” the jury found beyond a reasonable doubt that he had had “an alcohol concentration of 0.15 or more within two hours of driving.” A.R.S. § 28-1382(A).

¶26 Artz incorrectly maintains that the statutory aggravating circumstance requires a BAC of “0.18 or more, not 0.15 or more.” The BAC level in § 13-702(C)(16) was lowered from 0.18 to 0.15 in 2001 and, therefore, Artz was subject to that standard. 2001 Ariz. Sess. Laws, ch. 51, § 1. Artz also contends that because the jury’s extreme DUI verdict was based on a BAC of 0.15 or more “within two hours of driving,” a BAC of 0.15 or more while driving “was not inherent” in the verdict. *See State v. Oaks*, 209 Ariz. 432, ¶¶ 22-23, 104 P.3d 163, 168 (App. 2004).

¶27 Uncontroverted evidence presented at trial, however, showed that Artz’s BAC at the time of the accident had been between .326 and .398. In view of that evidence, Artz has not met his burden to show that any reasonable jury, applying the proper standard of proof, could have found that Artz was not driving with a BAC of 0.15 or more at the time of the collision. *See* A.R.S. § 13-702(C)(16); *Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d at 609; *see also Ruggiero*, 211 Ariz. 262, ¶ 27, 120 P.3d at 696. And, again, “one *Blakely*-compliant or *Blakely*-exempt factor is enough to allow the trial court to consider

other aggravating factors,” including Artz’s criminal record<sup>4</sup> and harm to the victim’s family,<sup>5</sup> in sentencing him. *Burdick*, 211 Ariz. 583, ¶ 13, 125 P.3d at 1042. In sum, Artz has not met his burden of showing that the trial court fundamentally erred in imposing aggravated sentences or that any alleged error prejudiced him. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

### DISPOSITION

¶28 Artz’s convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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<sup>4</sup>Artz also argues the trial court erred in considering in aggravation that he “had been indicted for a felony.” But, he cites no authority for the proposition that a trial court cannot consider felony indictments under the “catch-all” provision, A.R.S. § 13-702(C)(24). *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S. And, we find misplaced his reliance on the general rule of statutory construction known as “*expressio unius est exclusio alterius*,” *Champlin v. Sargeant*, 192 Ariz. 371, ¶ 16, 965 P.2d 763, 766 (1998), in the context of a statute that specifically includes a “catch-all” provision that allows the court to consider: “Any other factor that the state alleges is relevant to the defendant’s character or background or to the nature or circumstances of the crime.” § 13-702(C)(24) (emphasis added).

<sup>5</sup>The trial court did not rely solely on Artz’s concession in its finding of harm to the victim’s family. Rather, it stated that this aggravating circumstance had been established “by the presentence report” and by “the letters . . . mentioning . . . emotional harm caused to the family as a result of this incident.”

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GARYE L. VÁSQUEZ, Judge